[2010] UKPC 7
Privy Council Appeal No 0091 of 2009

JUDGMENT

The Prime Minister of Belize
The Attorney General of Belize
v
Alberto Vellos
Dorla Dawson
Yasin Shoman
Darrell Carter

From the Court of Appeal of Belize

before

Lord Phillips
Lady Hale
Lord Mance
Lord Collins
Lord Clarke

JUDGMENT DELIVERED BY
Lord Phillips
ON

24 March 2010

Heard on 18 and 19 January 2010

Appellant	*Respondent*
Louis M. Young S.C. Dr Lloyd Barnett (Instructed by Charles Russell LLP)	Lisa Shoman SC (Instructed by Shoman Law)

LORD PHILLIPS:

Introduction

1. Independence Day for Belize was 21 September 1981. On that day Belize became an independent State in accordance with the provisions of the Belize Act 1981. Section 2 of that Act made provision for a Constitution of Belize ("the Constitution") to be provided by Order in Council. Part II (sometimes referred to as Chapter II) of the Constitution sets out the fundamental rights and freedoms to which everyone in Belize is entitled. Section 69 of the Constitution provides the manner in which the National Assembly is empowered to alter the Constitution.

2. The Referendum Act 1999 introduced a requirement that a referendum be held on, inter alia, "any amendment to Chapter II of the Constitution which derogates from the fundamental rights and freedoms guaranteed therein". The Board will refer to the referendum so required as a "Part II referendum". The Referendum Act was not passed according to the special requirements applicable to legislation which altered the Constitution (see below).

3. On 25 April 2008 the Government introduced the Belize Constitution (Sixth Amendment) Bill ("the Amendment Bill") which, in its original form, made very significant derogation from some of the fundamental rights and freedoms in Part II of the Constitution. On the same day the Government introduced the Referendum (Amendment) Bill. This removed from the Referendum Act the requirement to hold a Part II referendum.

4. On 9 May 2008 the four respondents, each of whom is a citizen of Belize, filed a Notice of Application for permission to apply for judicial review in order to seek a declaration that the Prime Minister had acted in breach of the Referendum Act by failing to request the Governor- General to issue a Writ of Referendum and an order of mandamus requiring him to do so. On 16 May 2008 Chief Justice Conteh granted the application for permission to seek judicial review and at the same time granted an interim injunction restraining the Attorney General from taking steps to obtain the Governor-General's assent to the Referendum (Amendment) Bill.

5. The respondents succeeded both before the Chief Justice and in the Court of Appeal to the extent described subsequently in this Advice. The principal contention advanced by the appellants, being the Prime Minister and the Attorney General of

Belize, both below and before the Board, is that the requirement in the Referendum Act to hold a Part II referendum was of no effect in law in that it purported to alter the Constitution. If that submission does not succeed, difficult issues arise as to the effect of the Referendum Act having regard to the complex series of events that have taken place since the respondents applied for judicial review.

The Constitution

6. Section 2 of the Constitution provides that the Constitution is the supreme law of Belize and that, if any other law is inconsistent with it, it is, to the extent of the inconsistency void.

7. Two of the fundamental rights and freedoms protected by Part II are particularly relevant. The first is the right to personal liberty protected by section 5. That section provides in particular that a person arrested or detained must be informed of the reason for this, be given access to a lawyer, be informed of his rights, be entitled to the remedy of *habeas corpus* (subsection 2) and must be brought before a court within 48 hours (subsection 3).

8. The second right is the right to ownership of property protected by section 17. This prohibits, subject to exceptions, the compulsory deprivation of property save under a law which provides for compensation and provides access to the courts to challenge the deprivation.

9. Part IV of the Constitution is concerned with the Governor-General. Section 34 provides that in the exercise of his functions he shall act in accordance with the advice of the Cabinet or a Minister save where (inter alia) he is required by the Constitution or any other law to act on his own deliberate judgment.

10. Part VI of the Constitution is concerned with the Legislature. This consists of the National Assembly, which is comprised of a House of Representatives and a Senate. Section 70 provides for the making of Standing Orders to regulate proceedings. Under these Bills receive three readings. Provided a Bill is passed by the House and agreed to by the Senate, or passed by the Senate and agreed to be the House, the Clerk of the House is required "as soon as possible" to present the Bill to the Governor-General for his assent. Section 81(2) of the Constitution provides that "When a Bill is submitted to the Governor-General for assent in accordance with the provisions of this Constitution he shall signify that he assents or that he withholds assent thereto." By section 81(3) upon the assent of the Governor-General a Bill becomes law.

11. Section 69 provides that to be valid a Bill to alter Part II of the Constitution cannot be submitted for a second reading until 90 days have passed from its introduction. Furthermore it has to be supported by at least three-quarters of the House of Representatives on its third reading. A Bill to alter any other of the provisions of the Constitution requires a two-thirds majority of the House of Representatives on its third reading. In either case a certificate of compliance has to be signed by the Speaker.

The Belize Constitution (Sixth Amendment) Bill

12. The relevant amendments in the Amendment Bill in its original form were to sections 5 and 17 of the Constitution. Clause 2 made amendments to section 5. These added to the list of laws under which persons could be detained laws making "reasonable provisions for the protection of children from engaging in criminal activities or other anti-social behaviour" and laws "relating to the detention of persons who are suspected on reasonable grounds of being involved in the commission of, or being likely to commit, a serious crime". Particularly significant was an amendment which removed the protections provided by subsections (2) and (3), which the Board has summarised in paragraph 7 above, to these persons, albeit that those detained on suspicion of serious crime could only be detained for an initial period of 7 days, subject to extension for a further period of one month on a court order made on an *ex parte* application.

13. Clause 3 amended section 17 to remove specified items from the protection against compulsory deprivation of property without compensation and access to a court:

> "Subsection (1) of this section does not apply to petroleum, minerals and accompanying substances, in whatever physical state, located on or under the territory of Belize (whether under public, private or community ownership) or the exclusive economic zone of Belize, the entire property in and control over which are exclusively vested, and shall be deemed always to have been so vested, in the Government of Belize:"

This was subject to the following proviso ("the proviso"):

> "Provided that the Government may by a contract for the prospecting and production of petroleum or minerals enable a contractor to acquire property in, title to, or control over any petroleum or minerals found in Belize, and in every such case, the provisions of subsection (1) of this

section shall apply to all petroleum or minerals which may come into the possession or control of a contractor by virtue of such contract."

The Referendum Act 1999 and the Referendum (Amendment) Act 2008

14. The relevant sections of the Referendum Act 1999 provide as follows:

"2.(1) Without prejudice to any law which provides for a referendum to be held on any specific issue, the National Assembly may by resolution passed in that behalf declare that a certain issue or matter is of sufficient national importance that it should be submitted to the electors for their approval through a referendum.

(2) Notwithstanding subsection (1) above, a referendum shall be held on the following issues: -

(a) any amendment to Chapter II of the Constitution which derogates from the fundamental rights and freedoms guaranteed therein; and

(b) any proposed settlement with Guatemala for resolving the Belize/Guatemala dispute.

3.(1) Within thirty days of the passing of the resolution by the National Assembly pursuant to section 2 above (or where a law provides for the holding of a referendum on a specific issue, within thirty days of a request made to that effect by the Prime Minister), the Governor-General shall issue a Writ of Referendum in a form similar to the Writ of Election in the Fifth Schedule to the Representation of the People Act, with such modifications and adaptations as are necessary to satisfy the provisions of this Act, to the returning officers of the electoral divisions of Belize, or of the particular district or area thereof, as the case may be.

(2) The day named in the Writ for the holding of a referendum shall not be less than thirty days after the issue of the Writ.

(3) The Writ of Referendum shall specify whether the referendum shall be held in the whole of Belize or in any specific district or area of Belize."

15. The Referendum (Amendment) Act 2008 Act was passed in circumstances which the Board will shortly describe. It has left unchanged the provisions relating to the settlement of the Belize / Guatemala border dispute, but otherwise radically amended section 2 of the 1999 Act. It has removed the requirement for a referendum in relation to amendment of Part II of the Constitution. It provides for a referendum where the National Assembly or 10% of the electorate identify "a certain issue or matter [as] of sufficient importance that it should be submitted to the electors for their views through a referendum".

The Interpretation Act

16. Section 28(1)(c) is relevant to some of the issues raised by this appeal. It provides that where any Act repeals any other enactment, unless the contrary intention appears, the repeal shall not "affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed".

The parallel litigation

17. It seems that in commencing judicial review proceedings the respondents were acting out of public spirit, being concerned at the proposed restrictions of fundamental rights of the citizens of Belize. It is not suggested that they had any interests in or connected with oil and minerals. There were others, however, who were particularly concerned at the effect of the amendments to section 17 on alleged private or communal rights in relation to oil and minerals. They commenced two actions, which were heard together, in which they made a more direct challenge to the proposed amendments. The actions are: *Barry M Bowen v Attorney General of Belize* (Claim No 445 of 2008) and *Belsize Land Owners Association Limited and others v Attorney-General of Belize* (Claim No 506 of 2008). The Board will describe these proceedings as "the Bowen Action". The claimants in the Bowen Action sought declarations that the Amendment Bill was unlawful inasmuch as the amendments to section 17 infringed fundamental constitutional rights.

A chronology of events

18. On 10 April 2008 the Prime Minister publicly announced the proposal to amend the Constitution and the Referendum Act. The two Bills had their first reading on 25 April and the House of Representatives referred the Amendment Bill to the Constitution and Foreign Affairs Committee ("the Committee"). The Committee proceeded to conduct extensive consultation throughout Belize. The Referendum (Amendment) Bill had its second reading on 14 May. It was passed by the House of Representatives with a two-thirds majority. By 25 May it had completed its passage through the National Assembly. It could not, however, be presented to the Governor-

General for his assent by reason of the interim injunction granted by the Chief Justice on 15 May. The respondents' claim for judicial review was heard by the Chief Justice on 30 June. On 7 July claim No 445 was filed in the Bowen Action. On 28 July the Chief Justice gave judgment in favour of the respondents in the present Action (see below). He discharged the interim injunction that he had granted on 15 May. On 30 July the Referendum (Amendment) Bill received the assent of the Governor-General and became law.

19. The Committee reported on 22 August. It recommended that clause 2 of the Amendment Bill be deleted in its entirety. It further recommended that the proviso be deleted from clause 3. On 22 August the Amendment Bill had its third reading and was passed by a three quarters majority, subject to the amendments recommended by the Committee. The amended clause 3 became clause 2. On 26 August it was passed by the Senate. It did not, however, receive the assent of the Governor-General. The Board understands that this was because it was not considered proper to present it to him having regard to the challenges that had been made in this Action and in the Bowen Action.

20. On 16 October the Court of Appeal sat to hear the appeal in this Action. Ten days later, on 26 October, the Chief Justice sat to hear the Bowen Action. He gave judgment in that Action on 13 February 2009 (see below), ruling in favour of the claimants. On 27 March the Court of Appeal gave judgment in this Action, dismissing the appeal (see below).

21. Between 15 and 19 June the Court of Appeal sat to hear the appeal in the Bowen Action, adjourning this part heard. On 9 October the House of Representatives reconsidered the Amendment Bill and amended it to the extent of inserting a new proviso to the amended section 17, as follows:

> "Provided that nothing in this subsection shall affect the right of the owner of any private land beneath which any petroleum deposits are located to receive royalty from the Government, as provided in the Petroleum Act and the regulations made thereunder, existing at the commencement of the Belize Constitution (Sixth Amendment) Act."

22. On 26 October the Court of Appeal made an order in the Bowen Action, the material part of which was as follows:

> "THIS APPEAL having come on for hearing on 15th, 16th, 17th and 19th days of June 2009, on which days the Appellant made submissions to the Court on its Appeal, AND on the 26th day of October 2009

AND the National Assembly having, on the 13th October 2009, amended the Belize Constitution (Sixth Amendment) Bill 2008

IT IS THIS DAY ORDERED as follows:

1. The Appeal is dismissed.

2. Reasons for the Court's decision will be given at a later date."

The judgment of Chief Justice Conteh in this Action.

23. At the hearing before the Chief Justice there was a degree of common ground between the parties. First they appear to have been agreed that the obligation to hold a referendum was for the purpose of consulting the electorate. Neither side suggested that a favourable vote by the electorate was a condition precedent to the right of the National Assembly to amend the Constitution. Secondly the parties were in broad agreement as to when the Prime Minister's obligation to request a referendum arose on the facts of this case. The respondents contended that it arose when the Prime Minister announced his intention to amend the Constitution on 10 April 2008, or at latest when the Bill was introduced on 25 April. The appellants contended that the latter was the relevant date. The parties appear to have been agreed that it was implicit that, until a referendum had been held the Amendment Bill could not be presented to the Governor-General for his assent, although the precise nature of this implication was not spelt out. That indeed was their position at the start of the hearing before the Board. The fact that the Amendment Bill did not proceed through the legislative process and to the Governor-General for assent suggests that this was a view that was generally shared.

24. The Chief Justice observed at paragraph 17 of his judgment:

"The heart of the claimants' case in these proceedings is that the attempt to amend sections 5 and 7 of the Constitution without first holding a referendum as required by section 2(2)(a) of the Referendum Act is unlawful."

That the Referendum Act purported to impose a fetter on legislation in this way was the foundation for an argument on behalf of the appellants that that Act was unconstitutional and therefore invalid. The Chief Justice summarised this argument at paragraph 23 of his judgment:

> "Ms. Young S.C. also submitted that in any event, section 2(2)(a) of the Referendum Act was unlawful and unconstitutional in that it purports to put an additional fetter on the legislative powers to change the Constitution as provided for under section 69 of the Constitution. This was so she argued, because subsections (3) and (5) of section 69 already contain provisions regarding any changes to Schedule 2 of the Constitution relating to the protection of Fundamental Rights and Freedoms. Therefore, she further argued, the Referendum Act being an ordinary act had to be passed in the manner prescribed in subsections (3) and (5) in order to be valid."

25. The Chief Justice was clearly in sympathy with the respondents. He held at page 42 of his judgment:

> "in my view, section 2(2)(a) of the Referendum Act was intended to protect against the amending powers by a cyclical majority that is inherent in section 69(3) of the Constitution. For by this provision any political party with the necessary three-quarters majority in the House, can repeal, modify or amend **any** of the provisions of the Constitution relating to the Protection of Fundamental Rights and Freedoms. This leaves these rights and freedoms to the vagaries of a General Election and any resultant three-quarters majority a political party may be able to garner, tempered only by the lapse of ninety days between the first introduction of a bill to effect such alteration and the second reading of that bill in the House, no fundamental right or freedom it would seem, would be immune from alteration or derogation."

26. The Chief Justice rejected the appellants' submission that the Referendum Act purported to impose a fetter on the legislative process and was therefore an invalid attempt to alter the Constitution. He held that the duty to request a referendum did not arise until after the legislative process was complete. He held at paragraph 53:

> "In Belize, it is after an interval of ninety days after its first introduction in the House and with the support of the votes of not less than three-quarters of all the members of the House on its final reading can a bill effecting any amendment to section 69 itself and any of the provisions of Schedule 2 of the Constitution be lawfully regarded as altering or amending any of these provisions. This, I find, is the material time when the referendum requirement statutorily provided for in section 2(2)(a) of the Referendum Act, comes into play. It is the final vote in the House that determines whether or not the proposals in the bill will qualify as an amendment. It is on this amendment that the Prime Minister is required to request a writ of referendum from the Governor General who shall

> issue it within thirty days of the request. I am therefore unable to accept the contention of the claimants that it is prior to the legislative process such as the introduction and first reading of the bill, that would engage the referendum requirement. This is for the simple reason that until after the first reading, following by an interval of not less than ninety days before the second reading and on the final vote, of not less than three-quarters of all the members of the House in support of the bill, would it become an amendment. Until then, it is only a proposal or a bill whose future may well be uncertain. But once the legislative process is over, if successful, the bill becomes an amendment. It is to this amendment that section 2(2)(a) of the Referendum Act is addressed."

27. It does not appear that the Chief Justice considered that the presentation of a Bill to the Governor-General and his assent to the Bill formed part of the legislative process. It further seems implicit that the Chief Justice shared the views of the parties that the Governor-General could not properly be requested to assent to the Bill until the referendum had been held.

28. The Chief Justice held at paragraph 66 that the appropriate relief was to declare:

> "that **on the conclusion** of the legislative processes on clauses 2 and 3 of the Sixth Constitutional Amendment Bill 2008, these clauses of the said bill should be put to a referendum for the electorate to have their say."

29. How was it appropriate to grant the respondents this prospective declaration in proceedings that they had commenced right at the start of the legislative process? The answer appears to lie in the following passage from paragraphs 58 and 59 of the Chief Justice's judgment:

> "I find that in introducing the two bills on the same day, there was a clear attempt to remove from consideration or to deny an opportunity to the electorate of Belize to have a say on the proposed changes to sections 5 and 17 of the Belize Constitution. This I find was unavailing because the relevant law provides for a referendum on any relevant amendment. And the claimants and indeed, the electorate, had a legitimate expectation that in conformity with the relevant law at the time a referendum on the amendments would be held."

30. The Chief Justice observed that the Referendum (Amendment) Bill contained helpful provisions relating to the mechanics of the referendum and, "accordingly" discharged the interim injunction granted on 15 May.

The judgment of the Chief Justice in the Bowen Action

31. The Bowen Action was heard after the amendments to the Constitution proposed by the Amendment Bill had themselves been amended on the third reading in accordance with the recommendations of the Committee. The proviso to the amendment to section 17 of the Constitution had been deleted. The claimants objected to the amendment in its revised form, contending that its effect was to infringe property rights and remove access to the courts in respect of such infringement. The Attorney-General challenged this contention, arguing that the amendment was merely declaratory as, under earlier statutes, all petroleum rights and minerals had been vested in the Government and licences to prospect for petroleum had been granted on this basis. The Chief Justice did not accept this submission. He was concerned, in particular, that the amendment might negate community ownership rights under Maya customary land tenure. He was further disturbed that the amendment declared that petroleum should be deemed "always to have been … vested in the Government". He observed that this would have the effect of overriding royalty rights of private landowners, because these had been conferred by section 31(4) of the Petroleum Act on the basis that, prior to the enactment of that Act, they had the benefit of petroleum rights in respect of their land.

32. It is not necessary to summarise further the reasoning of the Chief Justice. It suffices to note that he granted the following declarations:

> "I find and declare that the enactment of clause 2 as it stands, particularly its purported disapplication of section 17(1) of the Constitution to petroleum and minerals, would not be in consonance with the Constitution. In particular, I declare that it would offend those parts of the Preamble of the Constitution regarding the ownership of private property; section 3(d) of the Constitution enjoining arbitrary deprivation of private property; section 6(1) of the Constitution guaranteeing equal protection of the law, implicit in which is unimpeded access to the Courts; and section 17 (1) itself which though not prohibiting the policy of clause 2 vesting petroleum and minerals in the Government of Belize, does not afford access to the Courts to test the validity of that vesting and to determine the interests, if any, of the claimants and to have compensation ordered and the enforcement of that compensation.

> I declare as well that the enactment of clause 2 with its purported exclusion of section 17(1) rights will offend and upset the basis structure of the Constitution of Belize regarding the principle of the separation of powers and its undoubted concomitant, the rule of law and the protection of fundamental rights especially those relating to the ownership and protection of property from arbitrary deprivation."

The Judgment of the Court of Appeal in this Action

33. Before the Court of Appeal, Mottley P, Sosa and Carey JJA, the appellants attacked the judgment of the Chief Justice on alternative bases. They submitted that if the Chief Justice was correct in holding that the obligation to request a referendum only arose on conclusion of the legislative process, no obligation had arisen when the respondents commenced proceedings and their claim should not have succeeded. Alternatively, if the obligation had arisen when the Bill was introduced, they relied upon the argument that the Referendum Act was an unconstitutional fetter on legislation.

34. In his judgment the President held that the referendum required by the Referendum Act was not part of the legislative process. It was part of a consultative process designed to ascertain the approval of the electorate to proposed amendments to the Constitution (paragraph 23). There was nothing to prevent the Government from proceeding with a measure that had not received the approval of the electorate other than the political consequences at the time of the next election (paragraph 26). The Act required a referendum to be held before a Bill intended to amend the Constitution was introduced to the National Assembly (paragraph 29). This had not been done. It followed that the Bill had to be submitted to the electorate at the late stage that had been reached. The situation was not ideal, but under the Referendum Act the electorate was entitled to be afforded the opportunity to state whether they approved of the proposed amendments (paragraph 32).

35. Sosa JA agreed with the judgment of the President.

36. In paragraph 43 of his judgment Carey JA questioned the Chief Justice's conclusion that the obligation to hold a referendum did not arise until the conclusion of the legislative process. He observed "I would have thought that the presumed *raison d'etre* of a referendum is to garner input from the populace to inform the proposed amendment". In the absence of a challenge to the finding he did not, however, overrule it. He held that the appellants had had a legitimate expectation that a referendum would be held and had an accrued right to seek redress for "an anticipated or threatened disappointment of that expectation" when they filed proceedings on 9 May 2008.

37. The Court of Appeal ordered that the orders of the Chief Justice be affirmed and that:

> "The proposed amendments contained in the Sixth Constitutional (Amendment) Bill which are intended to amend the fundamental rights and freedoms under the Constitution must now be submitted to the electorate."

38. The Court of Appeal made no mention of the fact that, after the Chief Justice had given his judgment, the proposed amendments to the Constitution were themselves radically amended, so as to delete entirely clause 2 of the Amendment Bill, which had been the primary subject of the respondents' attack. Nor did they consider the effect of the Referendum (Amendment) Act. The President observed, wrongly, that it did not appear that the Act had received the assent of the Governor-General and added that at any rate it had not been enacted on 9 May when the proceedings had been commenced. Nor did the Court of Appeal refer to the judgment given on 13 February by the Chief Justice in the Bowen Action. It seems implicit in some of the reasoning of the Court of Appeal that they assumed that the Bill would not be presented to the Governor-General for his assent until after the referendum that would be held as a result of their judgment.

Discussion

39. The series of events which the Board has described raise the following questions:

i) What is the effect of the order of the Court of Appeal in the Bowen Action?

ii) Was the Part II referendum required by the Referendum Act in its un-amended form a fetter on the legislative process?

iii) Having particular regard to the answer to question ii), did the requirement for a Part II referendum purport to alter the Constitution, with the consequence that it was void?

iv) When did the obligation to request a referendum in relation to the Amendment Bill arise?

v) What was the effect on the obligation to hold a referendum of the amendments that were made to the Amendment Bill?

vi) What was the effect on the obligation to hold a referendum of the passing of the Referendum (Amendment) Act?

vii) Should the Chief Justice have granted an interim injunction restraining the obtaining of the Governor-General's assent to the Referendum (Amendment) Act?

viii) What is the object of this appeal?

ix) What relief should the Board recommend?

What is the effect of the Order of the Court of Appeal in the Bowen Action?

40. Counsel were not agreed on the circumstances in which the Court of Appeal dismissed the appeal in Bowen at a stage when the appeal was part heard. Ms Young SC, who appeared for the appellants on this appeal and also appeared for the Attorney-General in the Bowen Action, told the Board that the Court of Appeal concluded that the insertion of the new proviso to section 17 of the Constitution into the Amendment Bill on 9 October 2009 rendered the appeal academic. She submitted that the Court of Appeal was correct so to conclude as, once royalty rights had been protected, the amendment to section 17 was no more than declaratory and was not expropriatory. Thus the Amendment Bill no longer had any provision which, under the un-amended Referendum Act, required a referendum.

41. Ms Shoman for the respondents was not able to agree this version of events. She further submitted that, even with the new proviso, there remained private or community interests in petroleum or minerals which were expropriated by the Amendment Bill.

42. The Board has since been provided with a transcript of proceedings before the Court of Appeal in the Bowen Action. This shows that the Court of Appeal dismissed the appeal because the alteration to the Amendment Bill had rendered the appeal academic. The Court of Appeal did not, however, express any view as to whether the Amendment Bill in its new form was open to challenge. That question was not before the Court. Equally it is clear that, in dismissing the appeal, the Court of Appeal was declining to rule on whether or not the Chief Justice's judgment was correct on the issues before him. As a result of the insertion of the new proviso to section 17 of the Constitution into the Amendment Bill the Court of Appeal concluded that those issues had become moot. It follows that the question of whether the Chief Justice was right or wrong remains unresolved. If he was right to rule that clause 2 of the Amendment Bill, as it was before him, was unconstitutional, it seems likely that its predecessor, clause 3, was unconstitutional for the same reason. It may be that the same was true of the original clause 2. If so, the relevant parts of the Amendment Bill could have no

effect in law and the issues that arise in relation to the referendum are academic. The Board proposes, however, to disregard that possibility and to address those issues.

Was the Part II referendum required by the Referendum Act in its un-amended form a fetter on the legislative process?

43. This question is relevant to the next question and, indeed, the two questions need to be considered together. This is because a basic principle of statutory interpretation requires the Referendum Act to be given an effect that is valid, rather than void, insofar as this is possible.

44. A statutory requirement to hold a referendum in relation to proposed legislation may be so drafted as to make the referendum a necessary step in the legislative process. *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett and another* [2005] UKPC 3; [2005] 2 AC 356 provides an example of such a provision. Had the Referendum Act contained such a provision it would unquestionably have purported to alter the provisions of the Constitution in relation to legislation and would have been void for failure to comply with the requirements of the Constitution for making such an alteration.

45. Neither party contended that the Referendum Act contained a provision of this nature, and the Board agrees. The Referendum Act required a referendum in a number of different circumstances, some of which did not involve legislation at all. On the natural meaning of the Act the purpose of the referendum was only consultative or advisory. Both the courts below so held, and they were right to do so.

46. It was, however, common ground that, under the un-amended Referendum Act, the Amendment Bill could not properly be placed before the Governor-General for his assent until a referendum had been held, and this view appears to have been generally held. Were this view correct as a matter of law, the Board would have concluded that the obligation to hold a referendum was just as much a fetter on the legislative process as if the holding of a referendum was an integral part of the process, and that the provision in the Referendum Act that required a Part II referendum to be held purported to alter the Constitution and was, accordingly, void. The Board has not, however, reached this conclusion. While the obligation to hold a Part II referendum would necessarily be triggered by some stage of the amendment of the Constitution Act, it was possible, as a matter of law, to treat the two processes as independent, so that the process of amending the Constitution Act could proceed in the normal way, whether or not a referendum was held and regardless of its result. This scenario is not attractive, for those who drafted the Referendum Act plainly intended that relevant legislative process should be informed by the views of the electorate. Nonetheless the Board feels constrained to conclude that it was the true state of affairs, for the

alternative would be to hold that the requirement to hold a Part II referendum was of no effect at all. Under the Referendum Act the incentive to comply with the obligation to hold a Part II referendum lay in the political fall-out that would follow disregard of that obligation and the effect of proceedings such as those brought by the respondents in this case. The obligation was, of course, one which in an appropriate case could be enforced by proceedings for judicial review. The obligation did not, however, impose a legal fetter on the legislative process.

Did the requirement in the Referendum Act for a Part II referendum purport to alter the Constitution, with the consequence that it was void?

47. This question is partly answered by the Board's answer to the previous question. The question remains of whether the requirement for a consultative or advisory referendum was one that purported to alter the constitution.

48. In the Board's view the answer to this question is that it was not. There is a difference in principle between requiring a referendum as part of the legislative process and requiring a referendum which is no more than advisory. The result of the referendum in the latter case imposes no obligation on the legislature. This conclusion is supported by authority in the United States Supreme Court on the question whether provisions in State law calling for referenda on proposed amendments to the United States Constitution are compatible with the amendment provisions of the Constitution. Article 5 of the federal Constitution provides that amendments must be ratified "by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress…."

49. *Hawke v Smith*, 253 US 221 (1920) concerned the 18th amendment to the United States Constitution introducing Prohibition. The Supreme Court decided that an amendment to the Ohio constitution to require a referendum on Ohio's ratification of the Prohibition amendment was incompatible with Article 5 of the federal Constitution.

50. Almost 60 years later a related question arose in relation to the Equal Rights Amendment to the US constitution: *Kimble v Swackhamer*, 439 US 1385 (1978). In 1977 the Nevada legislature enacted legislation requiring the submission of an advisory referendum, which expressly provided that it did not place any legal requirement on the legislature, as to whether the Equal Rights Amendment should be ratified by the Nevada legislature. Justice Rehnquist, sitting alone as a Circuit Justice on an urgent application for an interim injunction to restrain the referendum, held that the provision for a referendum was not inconsistent with the federal Constitution because it was not binding.

When did the obligation to request a referendum in relation to the Amendment Bill arise?

51. One of the defects of the Referendum Act was that it did not supply an express answer to this question. The answer falls to be implied by considering what is necessary to give efficacy to the legislation. The Board agrees with the Court of Appeal that the Chief Justice was wrong to hold that the referendum had to be held at the end of the legislative process, bar the Governor-General's assent. This solution might have made sense if the Act had made the approval of the electorate a condition precedent to the enactment of the constitutional amendment. It also solved the problem of the effect of amendments to the provisions that were the subject of the referendum in the course of or after the referendum. But it did not make sense where what the Act required was a consultative referendum. As Carey JA put it there was little to be gained by having a referendum when the amendment was a *fait accompli*, this being akin to "closing the barn door after the horse had long gone". The Board does not, however, agree with the President that the obligation to hold a referendum arose before the Amendment Bill was introduced into the National Assembly. It would have been impractical, and imprecise, if an obligation to hold a referendum could have been triggered by a mere proposal to amend the Constitution.

52. The Board considers that the least unsatisfactory answer to this question is that the obligation to hold a referendum arose on 25 April 2008, when the Amendment Bill was introduced and given its first reading. Under section 3 of the Referendum Act the Governor-General had to issue a Writ of Referendum within 30 days of the Prime Minister's request for this. The section does not specify when the Prime Minister had to make the request, but it was implicit that he should do so in time to enable the result of the referendum to be known before the expiry of the 90 days that had to elapse before the Amendment Bill could be given its second reading.

What was the effect on the obligation to hold a referendum of the amendments that were made to the Amendment Bill?

53. Holding a referendum is a major and expensive exercise, akin to holding an election. The problem with a mandatory obligation to hold a consultative referendum into proposed legislation is that it does not readily accommodate the possibility of changes to the proposed legislation in the course of the legislative process. A scheme under which a referendum is held between the first and second reading of a Bill will serve a useful purpose in that it will inform consideration of the Bill on its second reading. But if the Bill is significantly amended in the course of the second reading, the question then arises of whether a further referendum is required in respect of the

amended bill. This was the problem that led the Chief Justice to hold that the referendum did not have to be held until the conclusion of the legislative process.

54. The scheme of the Amendment Bill contemplates that the proposed amendments to the Constitution will give rise to discrete issues to which the electorate can give 'yes' or 'no' answers between the first and second reading of a Bill. It does not cater for the possibility of amendments raising significant new issues after the results of the referendum are known. Even less does the Amendment Bill contemplate what occurred in this case, namely no referendum between the first and second reading of the Bill and fundamental amendment to the Bill on the second reading.

55. In these circumstances it would be absurd to postulate that the obligation that had existed to hold a referendum in respect of the Amendment Bill in its original form subsisted after the Bill's second reading, and neither party so submitted. The only material part of the Amendment Bill which had survived was the proposed amendment to section 17, but this itself had been amended by deletion of the first proviso. The subsequent further amendment adding a new proviso to section 17 after the Bill's third reading served to make confusion more confounded. On one view, and it seems at least possible that this was the view of the Court of Appeal in the Bowen Action, all provisions derogating from fundamental rights and freedoms guaranteed by the Convention had been amended out of the Amendment Bill.

56. The Board is satisfied that the obligation to hold a referendum in relation to the alterations to the Constitution that were proposed by the Amendment Bill in its original form did not survive the amendments that were made on the second reading.

What was the effect on the obligation to hold a referendum of the passing of the Referendum (Amendment) Act?

57. If an obligation to hold a referendum persisted after the second reading of the Amendment Bill, did it survive the passing into law of the Referendum (Amendment) Act on 30 July 2008? By reason of section 28(1)(c) of the Interpretation Act the answer is that the obligation persisted "unless the contrary intention appears".

58. It appears to have been generally accepted that the intention of introducing the Referendum (Amendment) Act was to remove the requirement to hold a referendum in relation to the relevant proposals in the Amendment Bill. It may be that the Prime Minister so stated in his announcement made on 10 April 2008 in respect of the forthcoming legislation. The Board was not provided with any details of that announcement. The intention may also have been implicit in the introduction of the two Bills on the same day on 25 April and the consultation exercise that the Committee immediately undertook. The first respondent asserted in paragraph 23 of

his affidavit of 28 May, 2008, sworn in support of his application to seek judicial review, that the proposed amendments to the Referendum Act, concurrent with the proposed amendments to Constitution, evidenced the intention of the Prime Minister to avoid holding a referendum.

59. It was no doubt to prevent the Prime Minister from evading the need to hold a referendum that the respondents sought and obtained from the Chief Justice an interim injunction restraining the obtaining of the Governor General's assent to the Referendum (Amendment) Bill.

60. It is, however, open to question how far it is legitimate to have regard to these matters in deciding whether the Act, on its true construction, had retroactive effect. In the light of the conclusions that the Board has set out in paragraph 56 it is not necessary to resolve this issue and the Board does not propose to do so.

Should the Chief Justice have granted an interim injunction restraining the obtaining of the Governor-General's assent to the Referendum (Amendment) Act?

61. The Board suggested to Ms Shoman that it was not easy to identify any valid basis for the interim injunction granted by the Chief Justice and she did not have a ready answer, other than her clients' anxiety to leave no stone unturned in their efforts to prevent the derogation of fundamental constitutional rights. In the opinion of the Board the Chief Justice should not have granted the interim injunction.

What is the object of this appeal?

62. The answer give by Mr Lloyd Barnett to this question was that the Government wished to avoid the considerable expense of a referendum, as required by the Order of the Chief Justice, which had been affirmed by the Court of Appeal. Ms Shoman, for her part, accepted that the amendments that have been made to the Amendment Bill have given the respondents most, if not all, that they were seeking to achieve when they initiated these proceedings. She accepted that, in these circumstances there would be no point in holding the referendum that the Chief Justice ordered in relation to the Bill in its original form. She contended, nonetheless, that there remained aspects of the Amendment Bill in its current form that would have given rise to an obligation to hold a referendum under the Referendum Act, prior to the repeal of that Act. No attempt was made, however, by the respondents to persuade the Court of Appeal to substitute for the Order made by the Chief Justice an Order relating to the Amendment Bill in its revised form and it would not be appropriate for the Board to comment on the merits of such a course.

What relief should the Board recommend?

63. For the reasons given the Board declares that the Prime Minister is no longer under any obligation to request a Writ of Referendum that formed the subject of the Order of the Chief Justice and, accordingly, will humbly advise Her Majesty that this appeal should be allowed. Submissions in relation to costs should be submitted in writing within six weeks of today.